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FILE:

EAC 04 155 52444

Office: VERMONT SERVICE CENTER

Date: JUN 07 2006

IN RE:

Petitioner:
Beneficiary:

PETITION:

Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

§ Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consulting business that seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence, including amended tax returns. While the director erred in calculating the petitioner's ability to pay the proffered wage in 2004, the amended tax returns cannot overcome the director's concerns regarding 2003.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 16, 2003. The proffered wage as stated on the Form ETA 750 is \$43.60 per hour, or \$90,688 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since June 10, 2002.

On the petition, the petitioner claimed to have an establishment date in November 2000, a gross annual income of \$324,630, a net annual income of \$66,585 and eight employees. In support of the petition, the petitioner submitted its bank statements, a line of credit, an unaudited profit/loss statement for 2003 and its 2002 Form 1120-A U.S. Corporation Short Form Income Tax Return. In response to a request for additional evidence, the petitioner submitted its 2003 and 2004 Form 1120 U.S. Corporation Income Tax Returns. The tax returns, prepared by an accounting firm, reflect the following information for the following years including and subsequent to the priority date:

	2003	2004
Net income	(\$19,328)	\$29,590
Current Assets	\$55,159*	\$110,582
Current Liabilities	\$20,000*	\$47,442
Net current assets	\$35,159*	\$63,140

* The petitioner did not complete Schedule L in 2003. However, the numbers for the beginning of 2004 reflected on the 2004 Schedule L should represent the numbers for the end of 2003 that we would consider towards an ability to pay in 2003.

The petitioner also submitted compiled financial statements prepared by the same accounting firm that prepared the tax returns for 2003 and 2004. These statements reflect \$20,016.14 in net income and \$76,537 in net current assets in 2003 and \$49,150.28 in net income and \$124,471.98 in net current assets in 2004. Prior to appeal, the accountant provided no explanation for the differences between the tax returns and compiled financial statements. In addition, the petitioner submitted copies of the beneficiary's 2003 and 2004 Form W-2 Wage and Tax Statements reflecting wages of \$20,160 and \$52,320 respectively and 2005 pay stubs reflecting an hourly wage of \$30. The beneficiary received an additional \$6,932.61 from [REDACTED] in 2003. Finally, the petitioner submitted bank statements for 2003 through 2005 and evidence of a \$30,000 loan.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage to the beneficiary as of the priority date. The director, however, miscalculated the petitioner's net current assets for 2004 and failed to take into account wages actually paid to the beneficiary in 2004.

On appeal, the petitioner submits amended tax returns prepared by the same accountant who prepared the financial statements and the original tax returns and an analysis from an independent accountant, [REDACTED]. The amended tax returns do not increase the petitioner's net income. Rather, the petitioner now relies on net current assets to establish an ability to pay the beneficiary the full proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2003 or 2004. Specifically, the petitioner paid the beneficiary \$20,160 in 2003 and \$52,320 in 2004, \$70,528¹ and \$38,368 less than the proffered wage respectively.

¹ We will discuss the assertions regarding prorating below.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner paid the beneficiary \$70,528 less than the proffered wage in 2003 and \$38,368 less than the proffered wage in 2004. According to the initial tax returns submitted, in 2003 and 2004 the petitioner shows a net loss in 2003 and an income of only \$29,590 in 2004. In the same years, the petitioner shows net current assets of \$35,159 and \$63,140. As stated above, the director

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

miscalculated the petitioner's net current assets in 2004 and failed to take into account wages actually paid to the beneficiary in that year. Our analysis reveals that the petitioner is able to demonstrate an ability to pay the proffered wage in 2004. The petitioner has not, however, demonstrated the ability to pay the difference between the wages paid and the proffered wage in 2003 out of its net income or net current assets according to the initial tax returns submitted.

Any reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage unless they show sufficient and consistent increases over the necessary period. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L considered above in determining the petitioner's net current assets. Thus, the petitioner has not demonstrated that any other funds were available to pay the proffered wage.

In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998). Second, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

The compiled and, thus, unaudited financial statements that the petitioner submitted are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Counsel, the original accountant and Mr. [REDACTED] all request that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. Counsel submits non-precedent decisions issued by this office where we have considered prorating the proffered wage. Unlike precedent decisions, those decisions are not binding upon us. We acknowledge that the petitioner need only demonstrate an ability to pay the proffered wage after April 16, 2003. We will not, however, consider 12 months of income or wages paid towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income or wages paid towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence.

Rather, counsel and both accountants request that we deduct all the wages paid to the beneficiary in 2003, some of which were likely paid prior to April 16, 2003 since the beneficiary claimed on the Form ETA-750B to have been employed with the petitioner since June 2002. Thus, we will not deduct the full amount from the proffered wage. Rather, as the petitioner has not demonstrated that it increased the beneficiary's wages after April 16, 2003, we will deduct 71 percent of the wages paid during all of 2003, or \$14,305, as that would represent an approximation of the amount paid after April 16, 2003. If we deduct \$14,305 from the prorated (by 71 percent) proffered wage, or \$64,388, we are left with \$50,083 that the petitioner must demonstrate an ability to pay. Even if we considered the full \$35,159 in net current assets at the end of 2003, it is less than the difference between the prorated proffered wage and the actual wages paid after April 16, 2003.

On appeal, the original accountant states that the amended returns, prepared using the accrual basis, establish the petitioner's ability to pay the proffered wage in 2003. Mr. [REDACTED] asserts that the amended returns were prepared using a "hybrid" accounting method. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner submits copies of amended returns for 2003 and 2004. For the reasons discussed above, the original tax return for 2004 reflects sufficient net current assets to establish the ability to pay in that year. Thus, we need not consider the 2004 amended return. The petitioner has claimed the following amounts on its amended 2003 return:

Current assets	\$97,837
Current liabilities	\$21,300
Net current assets	\$76,537

As is clear, the petitioner has altered its total assets and liabilities, but not its income. The failure to alter the income and pay taxes on an altered income is unexplained. The lack of an explanation is especially troubling as the compiled financial statements that produce the same amount of net current assets as reflected on the amended tax returns also produce a net income before taxes of \$25,563. The accountant does not explain where this extra money came from except to assert that the taxes are now prepared using the accrual accounting method. Mr. [REDACTED] appears to address this issue by referencing a “hybrid” accounting method. We note that amended returns do not amend Schedule K, line one. Specifically, all of the Schedules K in the record, including those submitted on appeal, reveal that the returns were prepared using the cash method. The original accountant, who also prepared the amended return, did not check “Accrual” or “Other” on the amended return where requested to specify the method used. Mr. [REDACTED] and the original accountant have not adequately explained why using the accrual or a “hybrid” method for Schedule L does not require the taxpayer to so indicate on Schedule K.

The Internal Revenue Services requires the submission of Form 3115 on behalf of each applicant seeking consent to change an accounting method. Specifically, the publicly available instructions for the Form 3115 state that a corporate taxpayer should file “Form 3115 to request a change in accounting method, including the accounting treatment of *any* item.” (Emphasis added.) The instructions further require a form for “each unrelated item or submethod.” The record lacks evidence that the petitioner filed this form.

The petitioner initially reported income when it is received, consistent with cash convention, but has amended the tax returns to include income earned during a given fiscal year but not received during that year, which would be consistent with accrual. The petitioner’s choice of accounting methods has attributed income to various years as appropriate, and those amounts may not now be shifted to other years as convenient to the petitioner’s present purpose. Changing from the cash method to the accrual method may change the year-to-year distribution of the petitioner’s current assets, but the petitioner has not satisfactorily demonstrated why changing from the cash to accrual method would make available tens of thousands of dollars that would otherwise not have appeared in any year.

Our position is consistent with the business reference available at www.referenceforbusiness.com, which provides that while switching accounting methods generally results in adjustments to taxable income, not shown in this matter, “changing accounting methods does not permanently change the business’ long-term taxable income, but only changes the way that income is recognized over time.”

The petitioner has presented two vastly different pictures of its current assets, with no documentation to show why the second version is more credible than the first. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988).

The petitioner has not shown that the amended tax returns are more credible than the original returns. The petitioner has failed to submit credible evidence sufficient to demonstrate that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.